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## Arbitration of Employer Violations of the West Virginia Human Rights Act: West Virginia Should Make Like Ants Marching and Continue Its Pursuit of Bliss

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# ARBITRATION OF EMPLOYER VIOLATIONS OF THE WEST VIRGINIA HUMAN RIGHTS ACT: WEST VIRGINIA SHOULD MAKE LIKE ANTS MARCHING AND CONTINUE ITS PURSUIT OF BLISS

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## I. INTRODUCTION

In today's push-button, instant gratification world, real-time decisions and actions are required and indispensable.<sup>1</sup> Furthermore, the costs of litigation have increased exponentially.<sup>2</sup> Employers increasingly are requiring employees to sign arbitration agreements as a condition of employment.<sup>3</sup> As a result, the pre-printed employment contract has become as much a part of the American workplace as the annoying guy with the comb-over who wants to talk about how his Saturday night blind date left before dessert.

The agreement to submit claims to arbitration, now a standard clause in most employment contracts, has been in existence for some time but has recently become a hotly contested area of law.<sup>4</sup> In the employment context, employees agree to forgo claims in the traditional judicial forum and thus the constitutional guarantee of a jury trial, instead settling for adjudication through an arbitrator.<sup>5</sup> Scholars and litigants have exhausted hours trying to determine the legal force of such agreements.<sup>6</sup>

For example, imagine a young West Virginia woman, Heroine, anxious to achieve some financial independence from her parents in order to buy a pair of brown leather heels and matching clutch that were previously cost-prohibitive, accepts employment at the local Burger Bliss as evening shift cashier. Having recently celebrated her eighteenth birthday, she proudly signs her own name (for the first time) to her employment contract. Although a high-end outfit such as Burger Bliss is not likely to have any disagreement with its motivated workforce, the company, like most, still requires employee contracts to contain arbitration agreements to settle any dispute that may arise.

Heroine has a co-worker, Chester, who, after years of dedicated Burger Bliss service, has worked his way up to manager of the evening shift. Unfortunately, Chester, wearing his formerly white, short-sleeved, button-down Burger Bliss shirt and thin moustache informs Heroine that she will soon be fired unless

<sup>1</sup> Laura Kaplan Plourde, Note, *Analysis of Circuit City Stores, Inc. v. Adams in Light of Previous Supreme Court Decisions: An Inconsistent Interpretation of the Scope and Exemption Provisions of the Federal Arbitration Act*, 7 J. SMALL & EMERGING BUS. L. 145, 147 (2003).

<sup>2</sup> *Id.* at 147 n.1 (citing David L. Gregory, *The Supreme Court's Labor and Employment Law Jurisprudence, 1999-2001*, 36 TULSA L. REV. 515 (2001)).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 147. "The issue of mandatory arbitration of employment disputes has garnered much attention from lawyers, judges, academia, business professionals, and employee rights groups . . . ." *Id.*

<sup>5</sup> *Id.* at 147 n.1.

<sup>6</sup> See Gregory, *supra* note 2, at 544.

she becomes intimately acquainted with him. Embarrassed and trapped by her boss's ultimatum, she regretfully relents.

Later, after consulting Hero, her lawyer, she decides to file suit against Burger Bliss for sexual harassment. Hero, experienced in employment discrimination cases, plans to allege a violation of the West Virginia Human Rights Act.<sup>7</sup> Reviewing Heroine's employment contract, Hero realizes that it contains the dreaded arbitration clause. Hoping to avoid the less sympathetic Burger Bliss-appointed arbitrator, Hero delves into his research to find just how enforceable the arbitration clause is going to be in the face of a statutory civil rights violation. What Hero will find is a major conflict between West Virginia law and United States Supreme Court decisions.

Hopefully, Hero's arguments will persuade the West Virginia courts to stick to their guns. The West Virginia Supreme Court of Appeals held in *Copley v. NCR Corp.* that the West Virginia legislature created a private cause of action under the West Virginia Human Rights Act and intended those claims to be heard by a jury.<sup>8</sup> Arbitration of human rights claims is against the policy evidenced by the West Virginia act.<sup>9</sup> Furthermore, as a precondition to employment, arbitration agreements are rarely, if ever, the result of bargaining between equal parties, and are usually advantageous to the employer.<sup>10</sup> Although unconscionability arguments have been widely rejected, the West Virginia court has given plaintiffs some solace in the fact that Human Rights Act violations will rightfully be brought in front of their peers and resolved in public.

On the other hand, the United States Supreme Court has been much less receptive. In *Gilmer v. Interstate/Johnson Lane Corp.*<sup>11</sup> the Supreme Court rejected the idea that claims arising under federal civil rights statutes must be tried in a public forum, and allowed a federal age discrimination claim to be forced to arbitration. Furthermore, the U.S. Supreme Court decision in *Southland Corp. v. Keating*<sup>12</sup> stands for the proposition that the nondescript Federal Arbitration Act (FAA)<sup>13</sup> preempts state laws that prevent arbitration for certain claims. Therefore, West Virginia's stance on arbitration may be tenable.

However, West Virginia should not budge. Arbitration, although arguably a more efficient and expedient forum, presents public policy concerns. Forcing discrimination claims to arbitration stifles the development of anti-discrimination laws because arbitrations are private matters and no record of decision or evidence of discrimination is disseminated through public channels.

<sup>7</sup> W. VA. CODE § 5-11-1, *et seq.* (2002). This act protects employees from workplace discrimination and sexual harassment, among other vital civil rights protections.

<sup>8</sup> 394 S.E.2d 751, 755-56 (W. Va. 1990). *See infra* Part III.A.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> 500 U.S. 20 (1991). *See also infra* Part III.C.

<sup>12</sup> 465 U.S. 1 (1984). *See also infra* Part IV.A.

<sup>13</sup> 9 U.S.C. § 1, *et seq.* (2000). *See also infra* Part II.A.

Furthermore, employee-plaintiffs are disadvantaged because employers usually control the process, employers get the “repeat player” advantage, and administrative costs of arbitration are relatively higher on the employee.<sup>14</sup>

Section II of this Note examines the arguments both for and against pre-dispute arbitration agreements in employment contracts.<sup>15</sup> Section III examines the conflict between West Virginia decisions and United States Supreme Court decisions involving the enforceability of arbitration agreements. In Section IV, this Note will examine the viability of the West Virginia stance on arbitration in light of intervening developments in both United States Supreme Court and West Virginia case law.<sup>16</sup>

Section V will make suggestions to the West Virginia Supreme Court of Appeals on which direction to pursue in order to ensure that employee-plaintiffs are not unjustly deprived of their constitutional and statutory right to a jury trial. Hopefully, West Virginia will remain vibrant in its stance that violations of the Human Rights Act are not subject to arbitration clauses. Accordingly, Hero will not be constrained by arbitration and will be able to obtain justice to the fullest extent for our Heroine. Section VI concludes the Note.

## II. “TRUE REFLECTIONS”: BACKGROUND INFORMATION ON ARBITRATIONS

This section will provide a backdrop of information of all relevant statutory and case law necessary to understanding the interplay of federal and state laws regarding arbitration and employee civil rights. Subpart A will examine the background and history of the Federal Arbitration Act. Subpart B will present the respective arguments over the fairness of the arbitration process. Subpart C will bring to light due process concerns raised by the fact that arbitration implies a waiver of a traditional judicial forum, and Subpart D will briefly introduce the West Virginia Human Rights Act.

### A. *The Federal Arbitration Act*

Arbitration agreements have provided an increasingly utilized method of resolving disputes since the fourteenth century.<sup>17</sup> During the European Middle Ages, trade groups organized and set community standards and practices for trade.<sup>18</sup> In order to enforce these standards, the trade groups organized the first

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<sup>14</sup> See *infra* Part II.C.

<sup>15</sup> This Note is only concerned with arbitration in the non-union context. Bargaining power concerns and fairness issues become less accentuated when employees are represented by collective bargaining.

<sup>16</sup> See *Copley*, 394 S.E.2d 751.

<sup>17</sup> See Karen Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969-70 (1999).

<sup>18</sup> *Id.* at 970.

arbitration processes and procedures.<sup>19</sup> Community elders, drawing on local norms, arbitrated and resolved disputes.<sup>20</sup>

Arbitrations in the United States began in much the same way. American trade groups formed arbitration arrangements mainly to settle disputes arising within a particular industry.<sup>21</sup> This alternative means to settling disputes was advantageous to the members of the trade groups because it was quick, efficient, and less costly and onerous than traditional judicial resolution.<sup>22</sup> Due to these advantages, arbitration became commonplace.<sup>23</sup> In 1927, over 1000 trade associations had arbitration processes in place to settle disputes among their members.<sup>24</sup> However, arbitration agreements soon found a formidable foe in the American judiciary.

Although arbitration clauses were included in employment contracts early in American jurisprudence, courts were not ready to enforce a clause that supplanted their jurisdiction over a dispute.<sup>25</sup> The doctrine known as “the old judicial hostility to arbitration” was founded upon the theory that arbitration was not an affirmative defense to a contract action.<sup>26</sup> Additionally, courts of equity were unwilling to stay proceedings because of arbitration agreements.<sup>27</sup> Furthermore, based on the theory that the arbitrator was the agent of both parties, courts ruled that arbitration agreements were revocable by either party before the imposition of an arbitration award.<sup>28</sup>

As a result, trade groups pooled their resources in order to seek a legislative remedy in Washington, D.C.<sup>29</sup> In the early 1920’s, trade groups presented Congress with alternate plans aimed at correcting the judicial hostility towards arbitration.<sup>30</sup> The first plan was patterned after procedures in the state of Illinois.<sup>31</sup> A New York statute was the model for the second plan.<sup>32</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 971.

<sup>22</sup> *Id.* at 970-71.

<sup>23</sup> *See id.* at 971-73.

<sup>24</sup> *Id.* at 970.

<sup>25</sup> David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 16 (2004). *See also* Stone, *supra* note 17, at 973.

<sup>26</sup> Schwartz, *supra* note 25, at 16-17.

<sup>27</sup> *Id.* at 17.

<sup>28</sup> *Id.* at 16-17.

<sup>29</sup> *See* Stone, *supra* note 17, at 985-86.

<sup>30</sup> *Id.* at 986.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

The Illinois statute enforced only arbitration agreements that were consummated after the dispute arose.<sup>33</sup> Illinois also allowed *de novo* judicial review of all arbitration awards.<sup>34</sup> The New York statute enforced all disputes, regardless of whether the arbitration agreement was signed before or after the dispute.<sup>35</sup> Judicial review was narrowly limited to cases where the arbitrator committed a clearly erroneous application of the substantive laws.<sup>36</sup> After intense lobbying from trade associations, Congress adopted the New York version almost verbatim, passing the Federal Arbitration Act<sup>37</sup> (FAA) in 1925.<sup>38</sup>

Since the passage of the FAA, the attitude of American courts has changed considerably. Early on, courts were unwilling to relinquish jurisdiction over cases.<sup>39</sup> Now, with the modern explosion of litigation, courts are more than willing to let others resolve disputes.<sup>40</sup> Courts are overworked, and dockets are jammed.<sup>41</sup> Therefore, it is less than surprising that the U.S. Supreme Court has tended to come down on the pro-arbitration side of the fence.

Although arbitration agreements arguably may be unfairly imposed on employees, the FAA was an important and necessary piece of legislation. The hostility towards arbitration was a major restraint on the freedom of parties to contract and evidence of unwarranted paternalism. However, Congress would have been well advised to adopt the Illinois rule, which allows arbitration only if the agreement to arbitrate was entered into after the dispute arose.<sup>42</sup> Parties should be free to contract so long as both parties are fully aware of the terms of the agreement and the facts underlying the dispute at hand. In pre-injury arbitra-

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<sup>33</sup> *Id.* at 985-86.

<sup>34</sup> *See id.* at 982-86.

<sup>35</sup> *Id.*

<sup>36</sup> *See id.* at 982-84.

<sup>37</sup> 9 U.S.C. § 1. The operative language in the Act is as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

*Id.* § 2.

<sup>38</sup> Stone, *supra* note 17, at 986.

<sup>39</sup> *See* Thomas A. Manakides, Note, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. CAL. L. REV. 433, 434 (2003).

<sup>40</sup> *Id.* at 433-35. "It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens." *Id.* (quoting *Casarotto v. Lombardi*, 886 P.2d 931, 940-41 (Mont. 1994)).

<sup>41</sup> *Id.*

<sup>42</sup> *See supra* text accompanying note 33.

tion agreements, the parties are unaware of the factual situations that give rise to a dispute.

Returning to our story, would Heroine ever have agreed to arbitration after Chester illegally propositioned her? A party should not be forced into arbitration simply because she lacks the ability to see into the future. In truth, employees are unlikely to understand the consequences of the arbitration agreement, and it is nearly impossible that an employee will foresee the circumstances that will provoke its use.

*B. "What Would You Say?": Are Plaintiffs Better Off in Court or Arbitration?*

As a general statement, plaintiffs' attorneys and civil rights advocates think of arbitration as a hindrance to complete justice and thorn in the side of an employee's civil rights. To the defense bar and big business, it is an efficient, cost-saving forum that can diminish the impact and influence of lawyers. Both sides of the argument wrangle facts, figures, and statistics in order to buttress their respective positions.<sup>43</sup>

Therefore, it is important to view any statistical analysis with a large grain of salt. It is an extreme overgeneralization to say that plaintiffs are better off in either forum. Each case is different, and each plaintiff will have distinct goals for the claim. Nevertheless, in the vast majority of disputes over arbitration agreements, employee-plaintiffs are seeking to circumnavigate the clause, while employer-defendants are trying to enforce arbitration.<sup>44</sup> If arbitration were truly an equal forum, would there be so much litigation over the enforcement of an arbitration clause?

Arbitration proponents usually point to the relative overall cost-advantage of arbitration, arbitration's advantage over the court system's inertia in disposing of claims, and arbitration's simplicity of procedures.<sup>45</sup> Generally, opponents of arbitration concede these points, and instead argue that arbitration clauses are usually unconscionable contracts of adhesion and that individual rights go without vindication in arbitration proceedings.<sup>46</sup> However, the arguments can cut both ways.

For example, pro-arbitration groups can find statistics to support the argument that plaintiffs' interests are better served in arbitration. According to a

<sup>43</sup> "There are three kinds of lies: lies, damn lies, and statistics." Benjamin Disraeli, former Prime Minister of Great Britain. Bartleby.com, *The Columbia World of Quotations* (1996), <http://www.bartleby.com/66/96/16796.html>.

<sup>44</sup> After reviewing a seemingly endless heap of arbitration-clause cases, the author is confident to a reasonable degree of certainty in this assessment.

<sup>45</sup> See, e.g., *State ex rel. Saylor v. Wilkes*, 613 S.E.2d 914 (W. Va. 2005). In *Saylor*, EDSI's arbitration contract lists all of these advantages to arbitration in the contract itself. *Id.* at 917-19.

<sup>46</sup> See *id.* Plaintiff makes both of these arguments in *Saylor*. *Id.*



widely accepted study on private arbitration,<sup>47</sup> plaintiffs get more than a fair shake in alternative dispute resolution. Professor Lisa Bingham's statistics taken from all nonunion employment disputes arbitrated by the American Arbitration Association in 1992 reveal that plaintiffs prevail in arbitration more often than in normal civil proceedings.<sup>48</sup> To be more exact, from 1993-1995, plaintiffs filing claims against their employers prevailed 63% of the time in arbitration compared to only 14.9% in federal district courts.<sup>49</sup>

On the other hand, a different published study of security industry arbitrations suggests otherwise. Overall plaintiff success rates were 57.6% in jury trials to 53.2% in arbitrations, but wider margins appear in situations of discrimination claims (44.4% to 26.1%), tort claims (47.1% to 17.9%), and contract claims (59.0% to 41.0%).<sup>50</sup>

However, success or failure in an employment dispute cannot be quantified only in wins and losses. Although a plaintiff may "prevail" in a dispute, if the plaintiff is shortchanged by a damage award, that is not success. For example, a statistical picture of employment disputes from an anti-arbitration point of view paints this image: the median award amount in arbitration was \$49,000 compared with \$264,000 in jury verdicts.<sup>51</sup> In the Bingham study, the median award was \$49,000 in arbitration as opposed to \$530,000 in federal district courts.<sup>52</sup>

On the other hand, simply comparing award amounts is insufficient.<sup>53</sup> Much like snowflakes, each employee claim is unique. Professor Bingham's study realized this phenomenon and compared awards as a percentage of amount originally demanded. Claims in arbitration received an average of 25% of the original amount demanded, while claims resolved in federal district court received an average of 70% of the original demand.<sup>54</sup> Although these figures weigh against arbitration, Professor Bingham discounts the figures according to success rates<sup>55</sup> to come up with "adjusted outcomes."<sup>56</sup> The adjusted outcome in

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<sup>47</sup> Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. OF CONFLICT MGMT. 369 (1995).

<sup>48</sup> Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 46 (1998).

<sup>49</sup> *Id.*

<sup>50</sup> David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in An Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 64-66 (1997). The statistical observation period ran from 1989 to 1994. *Id.* The survey results were issued by the National Association of Securities Dealers and the New York Stock Exchange. *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See common argument comparing apples to oranges.

<sup>54</sup> Schwartz, *supra* note 25, at 18.

<sup>55</sup> *Id.* The success rate is 63% in arbitration versus 14.9% in federal district courts. *Id.*

arbitration is 18% of original amount demanded compared with 10.4% in federal district court.<sup>57</sup>

This dizzying display of statistics makes at least one thing clear: a simple overview of figures paints an ambiguous picture as to whether employer or employee holds any advantage in arbitration. Therefore, it seems unfair to force a potential plaintiff to choose a forum before the employer commits an act that gives rise to an employee claim. Moreover, when employment is preconditioned upon acceptance of arbitration for disputes with the employer, the sting of unfairness becomes even more perceptible because the arbitration agreement compels the employee to either settle future unknown disputes in the employer's choice of forum or look for another job.

To illustrate, imagine that Heroine, during her application process at Burger Bliss, tells Chester that she would like to work for him, but she is wary of the arbitration clause. Heroine tells Chester that she will not begin work under the current contract unless the arbitration clause is stricken. Not surprisingly, Chester tells Heroine that maybe the Me Amore: Tacos restaurant down the street is hiring. Heroine, if she insists on striking the arbitration clause, will lose the job at Burger Bliss, and is stuck wearing her chunky black boots instead of that perfect pair of brown leather heels.

### C. *"Pay For What You Get": Ensuring Due Process Concerns in Arbitration*

Arbitration agreements are a serious legal matter because they remove disputes from the consideration of a jury, a constitutionally-based right.<sup>58</sup> Furthermore, a large portion of the animosity towards arbitration stems from the fact that arbitrations lack uniform rules and procedures.<sup>59</sup> Opponents of arbitration perceive deprivation of a jury as an impairment to the allegedly wronged employee because it is a waiver of a fundamental right. In waiving the right to a jury trial, opponents fear that the arbitration process will deprive a potential plaintiff of due process rights.

Lewis Maltby, Director of the National Task Force on Civil Liberties in the Workplace, has detailed due process concerns generated by arbitrations.<sup>60</sup> Employers can and often do provide completely internal means of resolving

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<sup>56</sup> Bingham, *supra* note 47, at 370. Adjusted outcome is the percentage of amount demanded multiplied by the success rate. *Id.* In other words, plaintiffs win considerably more money outside of arbitration, but a "win" is much harder to achieve. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> The Seventh Amendment to the U.S. Constitution and Article III, § 13 of the West Virginia Constitution have similar language. Both preserve the right to a jury trial for suits at common law for values in controversy exceeding twenty dollars. U.S. CONST. amend. VII; W.VA. CONST. art. III, § 13.

<sup>59</sup> See generally Maltby, *supra* note 48, at 33.

<sup>60</sup> *Id.* at 32-34.

employee disputes.<sup>61</sup> Furthermore, because the employment contracts are drafted by the employer for its benefit, employers often unilaterally decide who will administer the arbitration, which rules and substantive law will govern the arbitration, and which, if any, remedies or money damages are available.<sup>62</sup> Therefore, the proverbial ball is in the employer's court.

More often than not, employers prefer arbitration.<sup>63</sup> Everyone agrees that arbitration is more expedient and less costly because pretrial motion practice and discovery are eliminated and attorneys require less preparation time.<sup>64</sup> Also, because of the diminished preparation and presentation, plaintiffs' attorney fees, which are sometimes part of the award, are less.<sup>65</sup> Additionally, as mentioned above, award amounts are usually less in arbitration than in traditional jury trials.<sup>66</sup>

Employers also prefer arbitration because the arbitration forum presents the defendant with a distinct home-court advantage. First, employers and their attorneys arbitrate regularly, while plaintiffs and plaintiffs' attorneys are rarely do.<sup>67</sup> This disparity has the possibility of creating a repeat player advantage because the arbitrator's future business depends on the satisfaction of the entity who hired the arbitrator.<sup>68</sup> Second, because of the lower awards, plaintiffs' attorneys working for contingency fees are less likely to take cases committed to arbitration.<sup>69</sup> Therefore, plaintiffs must search harder for an attorney, usually resulting in a lower quality of representation because, according to Mr. Maltby, the better attorneys will gravitate towards the possibility of higher awards in jury trials.<sup>70</sup>

Furthermore, arbitration plaintiffs face higher administrative costs.<sup>71</sup> Plaintiffs and defendants usually split the cost of arbitration, which includes filing fees sometimes in the thousands and anywhere from \$200 to \$700 hourly rates for the arbitrator.<sup>72</sup> Additionally, arbitrations are private matters, so plaintiffs lose the bargaining power that comes with media scrutiny.<sup>73</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> Schwartz, *supra* note 50, at 60.

<sup>65</sup> *Id.*

<sup>66</sup> *See supra* Part II.B.

<sup>67</sup> Schwartz, *supra* note 50, at 60.

<sup>68</sup> *Id.* at 61.

<sup>69</sup> *Id.*

<sup>70</sup> Maltby, *supra* note 48, at 32.

<sup>71</sup> Schwartz, *supra* note 50, at 60.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

One final advantage that defendants hold over plaintiffs is the unavailability of the discovery process.<sup>74</sup> Plaintiffs bear the burden of production of evidence, and this task can be insurmountable without the compulsory discovery process afforded by rules of civil procedure.<sup>75</sup> Without discovery, plaintiffs may be unable to obtain evidence that would have come to light and been dispositive in a judicial forum. Therefore, forcing a dispute to arbitration may, in itself, be outcome determinative of the claim.

With all of these advantages, it would be a foolish business practice not to include arbitration agreements in employee contracts. According to David S. Schwartz, ACLU Senior Staff Attorney, "[b]ecause corporations will typically interact with small players through contracts of adhesion, there is a substantial incentive to use form terms to lock in the advantages of arbitration in advance of any dispute."<sup>76</sup>

This is not to say that arbitration is completely unfair and biased towards big business employers. Arbitration can be fair and advantageous strategically and financially to a plaintiff. Clearly, arbitration provides more expedient results, lower or no attorney fees, and a less formal and strict proceeding. Plaintiffs may sometimes prefer arbitration and in fact be better off in arbitration, so long as the proceeding is conducted fairly.

To that end, the United States Department of Labor released an in-depth study of worker-employer relations and issued 7 criteria for fair arbitrations: (1) a impartial arbitrator; (2) employee access to pertinent information rivaling the discovery process in civil courts; (3) assurance of financial access to the system through cost-sharing between claimants and defendants; (4) the right to independent representation; (5) a full range of remedies comparable to those in civil courts; (6) publication of the arbitrator's written opinions; and (7) adequate judicial review of the arbitration to ensure substantive law is not misapplied.<sup>77</sup>

If arbitration can be conducted in an even-handed manner, then plaintiffs would be more likely to accept arbitration. Employee-plaintiffs, perceiving an inherent disadvantage in arbitrations, may sometimes seek to avoid the arbitration clause. The unfairness with arbitration arises because employees are forced to choose a forum before the employee is ever harmed by the employer. Therefore, because of the high potential for unfairness to employees, American courts should give careful scrutiny to arbitration clauses and interpret them as narrowly as possible.

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 61.

<sup>77</sup> COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 32, <http://www.dol.gov/asp/prgrams/history/reich/reports/dunlop/setion4.htm> (last visited Feb. 2, 2005).

### D. "Save Me": The West Virginia Human Rights Act

In particular, courts should pay special attention to arbitration clauses that waive rights to a jury trial in the case of legislatively enacted protections of civil rights. The development of civil rights law depends in part on public resolution of disputes.<sup>78</sup> First, public resolution will specifically deter the individual employer-defendant because there is an incentive for an employer to maintain a favorable reputation.<sup>79</sup> Second, public knowledge of a civil rights resolution will generally deter all employers from engaging in discriminatory actions in order to avoid being in disputes in the future.<sup>80</sup>

West Virginia has enacted a civil rights protection statute entitled West Virginia Human Rights Act,<sup>81</sup> which prevents employers from engaging in discrimination among its employees based on "race, religion, color, national origin, ancestry, sex, or age."<sup>82</sup> This act also lays out the procedures that an aggrieved employee must follow in order to seek recourse from a discriminatory employer.<sup>83</sup> An employee must first file a complaint with the Human Rights commission and then, once the employee has received a "right to sue letter," proceedings can commence in trial court.<sup>84</sup>

The West Virginia Supreme Court has ruled on what is necessary to sustain a claim under the Human Rights Act:

In order to make a prima facie case of employment discrimination under the West Virginia Human Rights Act . . . the plaintiff must offer proof of the following: (1) that the plaintiff is a member of a protected class; (2) that the employer made an adverse decision concerning the plaintiff; (3) but for the plaintiff's protected status, the adverse decision would not have been made."<sup>85</sup>

After a plaintiff has made a prima facie showing of discrimination, the burden shifts to the defendant-employer to present a "legitimate, non-discriminatory reason for its actions."<sup>86</sup> If a defendant meets this burden, then

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<sup>78</sup> Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law*, 56 WASH. & LEE L. REV. 395, 430-32 (1999).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> W. VA. CODE § 5-11-1, *et seq.* (2002). This statute supplements those protections afforded by federal civil rights and employment discrimination statutes such as Title VII and the ADEA. *Id.*

<sup>82</sup> W. VA. CODE § 5-11-9.

<sup>83</sup> W. VA. CODE § 5-11-10.

<sup>84</sup> *Id.*

<sup>85</sup> Syl. pt. 3, *Conaway v. Eastern Assoc. Coal Corp.*, 358 S.E.2d 423 (W. Va. 1986).

<sup>86</sup> *Freeman v. Fayette County Bd. of Educ.*, 599 S.E.2d 695, 700 (W. Va. 2004).

the plaintiff is given an opportunity to prove that the defendant's reasons were in fact discriminatory or pretextual.<sup>87</sup>

The West Virginia Human Rights Acts is an independent statutory basis for a cause of action against an employer. The West Virginia Supreme Court has held that, "[u]nder West Virginia law, an arbitration clause in an employment contract cannot defeat a human rights action filed by the claimant pursuant to [the Human Rights Act]."<sup>88</sup> The remainder of this Note will discuss the viability of that holding in light of recent developments in arbitration clause jurisprudence.

### III. "CRASH INTO ME": THE CONFLICT BETWEEN WEST VIRGINIA SUPREME COURT AND UNITED STATES SUPREME COURT CASE LAW

In applying the FAA, the West Virginia Supreme Court of Appeals and the U.S. Supreme Court have reached directly opposite conclusions. The difference arises in the interpretation of the exception for certain employment contracts in 9 U.S.C. § 1.<sup>89</sup> In *Copley v. NCR Corp.* the West Virginia Supreme Court of Appeals held that the arbitration clause in Copley's employment contract was not enforceable.<sup>90</sup> The *Copley* court based its decision on two distinct grounds. First, the court construed the exemption language in § 1 to exclude all employment contracts from the strictures of the FAA.<sup>91</sup> Secondly, the West Virginia court held in *Copley* that statutory-based Human Rights Act claims are not subject to arbitration.<sup>92</sup>

Conversely, the United States Supreme Court reached a contradictory conclusion in *Circuit City Stores v. Adams*.<sup>93</sup> In that decision the Supreme Court held that the exception applies only to those workers specifically employed by the transportation industry.<sup>94</sup> In so deciding, the Supreme Court directly overruled the first foundation underlying the West Virginia decision in *Copley*. However, on the one hand, the West Virginia decision in *Copley* rests on the grounds that claims arising under the West Virginia Human Rights Act are not subject to arbitration.<sup>95</sup> On the other hand, since *Copley*, the United States Su-

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<sup>87</sup> *Id.*

<sup>88</sup> Syl. pt. 2, *Copley v. NCR Corp.*, 394 S.E.2d 751, 752 (W. Va. 1990).

<sup>89</sup> The ambiguous language that has proven to be troublesome to courts is: "[B]ut nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1 (2000) (emphasis added).

<sup>90</sup> *Copley*, 394 S.E.2d 751.

<sup>91</sup> *Id.* at 753-55.

<sup>92</sup> *Id.* at 755-56.

<sup>93</sup> 532 U.S. 105.

<sup>94</sup> *Id.*

<sup>95</sup> Syl. pt. 2, *Copley*, 394 S.E.2d 751.

preme Court decided *Gilmer v. Interstate/Johnson-Lane Corp.*, which held that federal statutory civil rights claims are valid subjects of arbitration.<sup>96</sup>

Therefore, because the impact of *Gilmer* on West Virginia law is yet to be determined, the question of whether a West Virginia Human Rights Act claim is arbitrable remains open. West Virginia should remain steadfast in opposing arbitration of claims under this important workers' rights legislation. Remembering Heroine's unfortunate situation, Hero should be given the opportunity to present the facts of Heroine's employment disaster to a jury and not to a Burger Bliss appointed arbitrator. Doing so will help to fully vindicate her rights and make strides in ensuring that Burger Bliss or other employers of similar ilk will not repeat the offenses.

A. "The Best of What's Around": The West Virginia Supreme Court of Appeals decision in *Copley v. NCR Corp.*: *Human Rights Act Violations Are Not Arbitrable*

In *Copley v. NCR Corp.*, NCR employed Copley to sell computer hardware and software.<sup>97</sup> NCR was a Maryland corporation that manufactured and marketed computer products throughout the U.S.<sup>98</sup> In December of 1981, NCR assigned Copley to sell the products in the area surrounding his home base of Charleston, West Virginia, which included parts of Ohio and Kentucky.<sup>99</sup>

After about six years of employment in May of 1987, Copley filed a complaint with the West Virginia Human Rights Commission (HRC) alleging age and sex discrimination.<sup>100</sup> Then, NCR fired Copley in October of 1987.<sup>101</sup> As a result, Copley filed a reprisal complaint with the HRC against NCR, and then, after he received his statutory "right to sue" letter from the HRC, Copley filed a civil action against NCR and twelve other individual defendants in Cabell County Circuit Court.<sup>102</sup> Copley's complaint alleged breach of employment contract, unlawful discriminatory practices, and retaliatory discharge.<sup>103</sup>

In pretrial motions, NCR filed a motion to compel arbitration pursuant to the arbitration agreement in Copley's employment contract.<sup>104</sup> The trial court

<sup>96</sup> 500 U.S. 20 (1991). See *infra* Part III.C.

<sup>97</sup> *Copley*, 394 S.E.2d at 752.

<sup>98</sup> *Id.* at 753 n.6.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 752. Both age discrimination and sex discrimination are violations of the human rights act. Because the West Virginia Supreme Court's review of the case was limited to an appeal of the lower court's grant of a motion to compel arbitration, no factual record was available to describe the actual circumstances that gave rise to Copley's complaint. See *id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 752-53.

<sup>103</sup> *Id.* at 753.

<sup>104</sup> *Id.* The language of the arbitration agreement read: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settle [sic] by arbitration in accordance

granted NCR's motion and stayed the proceedings in Copley's civil suit pending the outcome of the arbitration.<sup>105</sup> Copley appealed to the West Virginia Supreme Court of Appeals seeking to avoid arbitration.<sup>106</sup>

The court found two grounds for overturning the lower court's grant of the motion to compel arbitration. First, the West Virginia Supreme Court of Appeals ruled that the employment contracts exception in the FAA exempts all employment contracts from forced arbitration.<sup>107</sup> The court reasoned that because the parties did not dispute that Copley's dealings with NCR "constituted a 'transaction involving commerce' within the meaning of Section 2" of the FAA, the issue was "whether the 'contracts of employment' exception contained in Section 1 removes this controversy from the mandatory arbitration provision of the [FAA]."<sup>108</sup> The court then stated, "[T]he parties do not cite, nor have we found, any decision in which the [United States Supreme] Court explains the meaning of the contracts of employment exception."<sup>109</sup>

Taking advantage of the clean slate, the *Copley* court held:

Under Section 1 of the Act, an exemption is provided for employment contracts of workers engaged in interstate or foreign commerce. Mr. Copley's employment contract falls within the exemption of Section 1. Accordingly, the circuit court had no authority under the [FAA] to compel enforcement of the arbitration clause in Mr. Copley's employment contract.<sup>110</sup>

West Virginia adopted the view that "any other class of employees engaged in foreign or interstate commerce" means exactly what it says. If an employee is under contract to do work that involves foreign or interstate commerce, then the arbitration clause in the employee's contract is not subject to arbitration pursuant to the FAA.<sup>111</sup>

The next issue presented in *Copley* was "the more critical question [of] whether an agreement to arbitrate contained in an employment contract can usurp certain statutory rights given to an individual."<sup>112</sup> In deciding this issue, the *Copley* court relied on three main sources of authority.<sup>113</sup> First, the court

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with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof." *Id.* at 752 n.2.

<sup>105</sup> *Id.* at 753.

<sup>106</sup> *Id.*

<sup>107</sup> *Copley*, 394 S.E.2d at 753.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 755.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*



cited *Davis v. Kitt Energy Corp.*,<sup>114</sup> which held, “A miner against whom an arbitration decision has been rendered under a collective bargaining agreement involving a safety claim is not foreclosed from pursuing a discrimination remedy under W. Va. Code § 22A-1A-20.”<sup>115</sup> In other words, an arbitration clause or even a final decision by an arbitrator in a collective bargaining agreement could not extinguish a statutorily created cause of action, at least in the instance of mine safety statutes.

Second, the *Copley* court cited *Alexander v. Gardner-Denver Co.*,<sup>116</sup> a United States Supreme Court case holding that a collective bargaining agreement to arbitrate does not supersede or waive a plaintiff’s right to pursue civil rights actions under Title VII.<sup>117</sup> Thirdly, the *Copley* court surveyed United States Circuit Courts of Appeals decisions and found that “[a] majority of the federal courts of appeals have concluded that even where an employee is subject to the [FAA], the contractual obligation to submit to arbitration cannot override or defeat a civil rights claim.”<sup>118</sup>

Based on these three building blocks, the West Virginia Supreme Court of Appeals decided in *Copley* that “we must conclude that under West Virginia law, an arbitration clause in an employment contract cannot defeat a human rights action filed by the claimant pursuant to W. Va. Code § 5-11-13(b).”<sup>119</sup> This well-reasoned holding is supported by language in the Human Rights Act. The Act has the significant purpose of deterring discrimination.<sup>120</sup> Furthermore, the Human Rights Commission (HRC), which is charged with enforcing the act, also has a legislatively defined duty.<sup>121</sup>

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<sup>114</sup> 365 S.E.2d 82 (W. Va. 1987). This case involved a coal miner who filed a claim of retaliatory discrimination pursuant to his rights under W. VA. CODE § 22A-1A-20 alleging that he had been fired for reporting safety violations to the mine safety board. The defendant invoked the arbitration clause in the miner’s collective bargaining agreement. *Id.*

<sup>115</sup> *Id.* at syl. pt. 4.

<sup>116</sup> 415 U.S. 36 (1974).

<sup>117</sup> *Copley*, 394 S.E.2d at 756.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> W. VA. CODE § 5-11-2 (2002).

It is the public policy of the state of West Virginia to provide all of its citizens equal opportunity for employment . . . . The denial of [human rights or civil rights] to properly qualified persons by reason of race, religion, color, national origin, ancestry, sex, age, blindness, disability or familial status is contrary to the principles of freedom and equality of opportunity and is destructive to a free and democratic society.

*Id.*

<sup>121</sup> W. VA. CODE § 5-11-4 (2002).

The commission shall have the power and authority and shall perform the functions and services as in this article prescribed and as otherwise provided by law. The commission shall encourage and endeavor to bring about mutual understanding and respect among all racial, religious and ethnic groups within

If claims arising under the Act are forced to arbitration, the HRC will never adjudicate them. With its jurisdiction over such claims revoked, the HRC becomes a partial nullity. It can no longer perform its legislatively delegated functions. Arbitration of Human Rights Act claims should continue to be disallowed because arbitration will stifle the duties of the HRC and thereby partially suffocate the development of West Virginia civil rights law.

*B. "Say Goodbye": The United States Supreme Court Decision in Circuit City Stores v. Adams: Claims Arising Under All Employment Contracts Are Arbitrable*

Ten years after the West Virginia decision in *Copley*, the Supreme Court handed down the *Circuit City* opinion. In *Circuit City*, employee-plaintiff Saint Clair Adams signed an employment application that contained an arbitration agreement before being hired as a sales counselor by Circuit City.<sup>122</sup> Two years later, Adams brought a civil action in California state court alleging employment discrimination based on California statutory rights and general tort theories.<sup>123</sup>

Circuit City responded by filing a suit in federal district court asking the court to enjoin the state action and enforce the arbitration agreement pursuant to the FAA.<sup>124</sup> During the pendency of this action, the Ninth Circuit handed down *Craft v. Campbell Soup Co.*,<sup>125</sup> which held, similarly to the *Copley* opinion, all employment contracts are exempt from the requirements of the FAA.<sup>126</sup> As a

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the state and shall strive to eliminate all discrimination in employment and places of public accommodations by virtue of race, religion, color, national origin, ancestry, sex, age, blindness or handicap and shall strive to eliminate all discrimination in the sale, purchase, lease, rental or financing of housing and other real property by virtue of race, religion, color, national origin, ancestry, sex, blindness, handicap or familial status.

*Id.*

<sup>122</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). The arbitration agreement read:

I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or relating to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example only, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and [the] law of tort.

*Id.* at 109-10.

<sup>123</sup> *Id.* at 110.

<sup>124</sup> *Id.*

<sup>125</sup> 177 F.3d 1083 (9th Cir. 1999).

<sup>126</sup> *Circuit City*, 532 U.S. at 110.

result, when the *Circuit City* case reached the Ninth Circuit, it followed *Campbell Soup* in holding that Adams's employment application was a contract of employment and therefore not subject to the FAA.<sup>127</sup>

The Supreme Court overruled the Ninth Circuit, holding that the exemptions in § 1 of the FAA apply to a narrow class of employees directly involved in transportation industries.<sup>128</sup> The Court reached its conclusion because the words "seamen" and "railroad workers" precede the contract of employment exception.<sup>129</sup> Therefore, if Congress intended to give "seamen and railroad workers" some meaning, then the exception was meant only to apply to transportation workers.<sup>130</sup> The court reasoned that if Congress had wanted to exclude all employment contracts, then the words "seamen and railroad workers" would be superfluous, violating a rule of construction of statutes.<sup>131</sup>

As a result, *Circuit City* stands for the proposition that the overwhelming majority of employment contracts are not exempt from the FAA's requirements to submit to arbitration. Therefore, as a general proposition, arbitration clauses contained in employment contracts are enforceable, "save such grounds as exist at law or in equity."<sup>132</sup> This result is not as destructive of employees' rights as the decisions that follow in *Circuit City*'s aftermath. Courts are overworked and overcrowded, and some relief from impenetrable docket schedules would be appropriate. However, there is a line in enforcing arbitration agreements that should not be crossed.

C. "Let You Down": The Supreme Court Decision in *Gilmer v. Interstate/Johnson Lane Corp.*: Statutory Based Discrimination Claims Can Be Forced to Arbitration

After *Circuit City*,<sup>133</sup> the West Virginia Supreme Court decision in *Copley*<sup>134</sup> remained good law on the narrow point that Human Rights Act based claims are not arbitrable. The viability of that portion of *Copley* was dealt a further blow by the United States Supreme Court decision in *Gilmer v. Interstate/Johnson Lane Corp.*<sup>135</sup> In *Gilmer*, Interstate/Johnson Lane ("Interstate") employed Gilmer in 1981.<sup>136</sup> As part of his employment requirements, Gilmer filed an application to be a securities representative with the New York Stock

<sup>127</sup> *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070 (9th Cir. 1999).

<sup>128</sup> *Circuit City*, 532 U.S. at 119.

<sup>129</sup> *Id.* at 114-15.

<sup>130</sup> *Id.* at 121.

<sup>131</sup> *Id.* at 114-15.

<sup>132</sup> 9 U.S.C. § 2 (2000).

<sup>133</sup> See *supra* Part III.B.

<sup>134</sup> See *supra* Part III.A.

<sup>135</sup> 500 U.S. 20 (1991).

<sup>136</sup> *Id.* at 23.

Exchange.<sup>137</sup> The application contained an arbitration clause stating that Gilmer agreed to arbitrate any dispute arising between him and Interstate.<sup>138</sup> In 1987, Interstate fired Gilmer, who was 62 years old at the time.<sup>139</sup> Gilmer felt that his termination was in violation of the federal Age Discrimination in Employment Act (ADEA).<sup>140</sup> As a result, he filed an age discrimination charge with the Equal Employment Opportunity Commission (“EEOC”), received a “right to sue” letter from the EEOC, and subsequently filed suit in federal district court.<sup>141</sup>

In response, Interstate sought to enforce the arbitration clause in Gilmer’s application with the NYSE.<sup>142</sup> The United States District for the Western District of North Carolina denied Interstate’s motion to compel arbitration, but the Fourth Circuit reversed that decision, holding that “nothing in the text, legislative history, or underlying purposes of the ADEA [indicates] a congressional intent to preclude enforcement of arbitration agreements.”<sup>143</sup>

The Supreme Court reached its decision in *Gilmer* keeping in mind the “liberal federal policy favoring arbitration agreements.”<sup>144</sup> The *Gilmer* Court looked to Sherman Act, Securities Exchange Act, and RICO decisions allowing arbitration of claims under those federal statutes, concluding that “[I]t is by now clear that statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA.”<sup>145</sup>

However, the Court left a small opening, “Although all statutory claims may not be appropriate for arbitration,” courts should enforce arbitration agreements unless the party opposing arbitration can show that “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>146</sup> Therefore, the main holding of *Gilmer* is that the opponent of arbitration of a federal statutory claim has the burden of showing that Congress, through text, legislative history, or the underlying purpose of the act, intended for claims under the Act to be adjudicated in a judicial forum only.<sup>147</sup>

Petitioner Gilmer’s argument ultimately failed. The Supreme Court did not accept Gilmer’s reasoning that the ADEA was an important avenue for promoting social policies of anti-discrimination, and arbitration hampered those

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> 29 U.S.C. § 621 (2000).

<sup>141</sup> *Gilmer*, 500 U.S. at 23.

<sup>142</sup> *Id.* at 24.

<sup>143</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197 (1990).

<sup>144</sup> *Gilmer*, 500 U.S. at 25 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)).

<sup>145</sup> *Id.* at 26.

<sup>146</sup> *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

<sup>147</sup> *Id.*

goals.<sup>148</sup> The Court was also not persuaded that the EEOC's functions would be hindered or that the absence of written opinions in arbitrations would slow the development of anti-discrimination law.<sup>149</sup> The Supreme Court's conclusions are wrong. Civil rights disputes need to be resolved in public. Behind-closed-doors arbitrations serve as disincentives to conform to civil rights standards because the employer-defendant has no fear of being exposed publicly.

After the *Gilmer* decision, the status of the West Virginia decision in *Copley* was up in the air because *Copley* also dealt with rights created under a civil rights statute. *Gilmer* applied to a federal anti-discrimination statute.<sup>150</sup> However, after *Gilmer* the question in West Virginia is whether its state human rights statute still protects employees from being forced to arbitration.

#### IV. "CRY FREEDOM": PREEMPTION OF STATE LAWS UNDER *SOUTHLAND V. KEATING AND ADKINS V. LABOR READY INC.*

##### A. "The Last Stop": Southland and Federal Preemption of State Laws Disfavoring Arbitration

Although *Southland Corp. v. Keating*<sup>151</sup> preceded *Copley* by six years, its impact on *Copley* was not felt until after *Gilmer* was handed down. Put generally, *Southland* holds that all state statutes prohibiting arbitration are void because they are preempted by the FAA.<sup>152</sup> *Southland* involved a dispute by a group of 7-Eleven franchisees against the owner and franchisor, Southland Corporation. The plaintiffs alleged, among other things, a violation of the disclosure requirements of California's Franchise Investment Act.<sup>153</sup>

Contained in the franchising agreement, of course, was an agreement to arbitrate disputes with the franchisor.<sup>154</sup> However, a provision in the California Franchise Investment Act voided any agreements that waived rights granted under the act, including agreements to arbitrate.<sup>155</sup> Therefore, there was a direct conflict between the FAA, which required enforcement of arbitration agreements, and California state law, which voided arbitration agreements in franchising agreements.<sup>156</sup>

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<sup>148</sup> *Id.* at 27-28.

<sup>149</sup> *Id.* at 31-32.

<sup>150</sup> *Id.* at 23.

<sup>151</sup> 465 U.S. 1 (1984).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 4.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 10 (citing CAL. CORP. CODE ANN. § 31512 (1977)).

<sup>156</sup> *Id.*

The trial court in California compelled arbitration of all of Keating's claims except the Franchise Act claim.<sup>157</sup> In doing so, the trial court held that the provision in the law voided arbitration agreements.<sup>158</sup> The intermediate appeals court reversed on the grounds that the California law did not void arbitration agreements, and even if the California law did void arbitration agreements, then that law violated the Supremacy Clause and would be stricken.<sup>159</sup> The California Supreme Court then reversed the appeals court.<sup>160</sup> In doing so, the court relied on the interpretation that the California law required judicial consideration of claims and that there was no Supremacy Clause conflict between the FAA and the state statute.<sup>161</sup>

The Supreme Court granted certiorari, although its jurisdiction over the case is arguably premised on shaky grounds.<sup>162</sup> The Court held that California's decision that its law requires a judicial forum "directly conflicts with § 2 of the Federal Arbitration Act and violates the Supremacy Clause."<sup>163</sup> The opinion further states, "Congress . . . withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."<sup>164</sup>

This precedent seems to discredit any argument that a state statute could trump any contractual agreement to arbitrate. However, *Southland* preceded the West Virginia decision in *Copley*. *Southland's* reasoning was fully available to the West Virginia Supreme Court at the time of *Copley*, but the West Virginia court chose not to adopt *Southland*. There is no mention of *Southland* in the *Copley* opinion. This curious omission allows plenty of speculation about why *Southland* did not control the West Virginia court's decision in *Copley*.

Possibly, the West Virginia court reasoned that civil rights claims are a different matter than franchising agreements because more social policies and importance surround resolutions of civil rights claims. This reasoning is suggested by the West Virginia court's reliance on the United States Supreme Court decision in *Alexander v. Gardner-Denver Co.*<sup>165</sup> The West Virginia court cited the following language: "Title VII . . . concerns not majoritarian processes, but an individual's right to equal employment opportunity. . . . [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII."<sup>166</sup>

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<sup>157</sup> *Id.* at 4.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 5.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See Schwartz, *supra* note 25, at 9.

<sup>163</sup> *Southland*, 465 U.S. at 10.

<sup>164</sup> *Id.*

<sup>165</sup> 415 U.S. 36 (1974) (holding that prior final judgment in an arbitration did not preclude pursuing a Title VII claim arising from the same factual occurrence).

<sup>166</sup> *Copley v. NCR Corp.*, 394 S.E.2d 751, 756 (1990) (quoting *Alexander*, 415 U.S. at 51-52).

Furthermore, the *Copley* opinion cites authority throughout the federal appeals courts supporting the proposition that civil rights claims are not subject to the requirements of the FAA.<sup>167</sup> It is possible, then, that the West Virginia court found no Supremacy Clause conflict because the FAA itself did not require civil rights claims to be forced to arbitration. Thus, any state rule to the same effect would be in opposition to the federal law. However, since the holding in *Gilmer* that federal civil rights actions are arbitrable, that line of reasoning is questionable.

*B. "Some Devil": Adkins v. Labor Ready, Inc. and Its Effect on West Virginia Law*

In *Adkins v. Labor Ready, Inc.*,<sup>168</sup> Labor Ready, a company who organizes day laborers so that potential employers could easily find manual labor for short periods of time, entered into employment arrangements with plaintiffs. Labor-Ready required its employees to sign employment applications acknowledging that employment was on a day-to-day basis.<sup>169</sup> Also, the agreements stated that at the end of each day, the employees would be deemed to have quit, and that any and all disputes arising between the employee and Labor Ready would be settled by arbitration.<sup>170</sup>

The plaintiffs felt that they were being paid inadequately and in violation of the federal Fair Labor Standards Act (FLSA)<sup>171</sup> and the West Virginia Minimum Wage and Maximum Hours for Employees<sup>172</sup> law.<sup>173</sup> As a result, they filed suit, and Labor Ready filed a motion to compel arbitration, which the district court granted.<sup>174</sup> After failing on other arguments, plaintiffs argued that the FLSA and state statutory based claims are not subject to arbitration.<sup>175</sup>

That argument was ill received by the Fourth Circuit. The court looked to *Gilmer*<sup>176</sup> and held that the plaintiffs must show congressional intent to preclude arbitration or an inherent conflict between the statute's purpose and arbitration.<sup>177</sup> Citing similarities between the FLSA and the ADEA that was at issue in *Gilmer*, the Fourth Circuit did not accept the plaintiffs' reasoning that these

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<sup>167</sup> *Id.* at 756.

<sup>168</sup> 303 F.3d 496, 499 (4th Cir. 2002).

<sup>169</sup> *Id.* at 499-500.

<sup>170</sup> *Id.* at 500.

<sup>171</sup> 29 U.S.C. §§ 201-219 (2000).

<sup>172</sup> W. VA. CODE § 21-5C-1 to 11 (2002).

<sup>173</sup> *Adkins*, 303 F.3d at 499.

<sup>174</sup> *Id.* at 499-500.

<sup>175</sup> *Id.* at 506.

<sup>176</sup> See *supra* Part III.C.

<sup>177</sup> *Adkins*, 303 F.3d at 506.

specific statutory claims are exempted from the FAA by virtue of their underlying intent.<sup>178</sup>

Finally, the plaintiffs cited *Copley* in support of the argument that West Virginia statutory based claims are not subject to arbitration.<sup>179</sup> The Fourth Circuit rejected that argument, stating, "Whatever force *Copley* may formerly have had, its ruling on arbitration cannot trump *Gilmer* and *Circuit City v. Adams*."<sup>180</sup> The Supremacy Clause precludes any argument to the contrary."<sup>181</sup> Apparently, before the FAA could be read to trump the West Virginia holding in *Copley* that Human Rights Act claims are not arbitrable, the FAA needed the judicial gloss applied by *Gilmer*. In other words, until the *Gilmer* decision, there was no federal policy that workplace civil rights violations could be arbitrated.

Although the language in *Adkins* seems to erode any viability left in *Copley*, that opinion may still have life. First, the opinion in *Adkins* was handed down by the Fourth Circuit, not the West Virginia court, due to the diversity among the parties. Second, the damning language in *Adkins* could be interpreted as dicta. None of the claims presented by the plaintiffs in *Adkins* are human rights based claims. Therefore, were the West Virginia court to hear another case, it could distinguish the Fourth Circuit's holding in *Adkins*.

Furthermore, the case of *Marusa v. Chicken of Summersville*<sup>182</sup> suggests that *Copley* is alive and well. In *Marusa*, female employees of a Kentucky Fried Chicken restaurant in Summersville, West Virginia were allegedly subjected to sexual harassment while on the job, which would be a violation of the West Virginia human rights act.<sup>183</sup> The employees' contract contained an arbitration agreement, and Chicken of Summersville filed a motion in Nicholas County Circuit Court to compel arbitration of the claims.<sup>184</sup>

The issue in the case was whether the human rights act violations were subject to the arbitration provisions, and after hearing arguments on the motion, the learned trial judge certified that specific question to the West Virginia Supreme Court of Appeals.<sup>185</sup> In the certification, the trial court cited *Copley* in answering that the Human Rights Act claims are not subject to arbitration, meaning that if the West Virginia Supreme Court of Appeals failed to accept the

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<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See *supra* Part III.B.

<sup>181</sup> *Adkins*, 303 F.3d at 506.

<sup>182</sup> West Virginia Supreme Court of Appeals No. 0401569, (Sept. 30, 2004), [http://www.state.wv.us/wvsc/calendar/sept30\\_04r.htm](http://www.state.wv.us/wvsc/calendar/sept30_04r.htm). The author attended hearings and read briefs filed in *Chicken of Summersville*. The facts herein are gleaned from personal knowledge obtained through those activities.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*



questions, then a trial would move forward in spite of the arbitration agreements.<sup>186</sup>

The five-member supreme court rejected the opportunity to answer the certified questions on September 30, 2004 by a vote of 3-2.<sup>187</sup> Although that decision has no effect on West Virginia law, it can be inferred that the West Virginia court, in light of *Southland*, *Gilmer*, and *Adkins*, still finds its holding in *Copley* good law. Had the court felt that *Copley* was dead letter, then it likely would have accepted the case and asserted as much. However, as it stands, *Copley*'s effect can still be felt in the West Virginia trial courts.

C. "Steady As We Go": *West Virginia Holds Serve in State ex rel. Saylor v. Wilkes: Certain Arbitration Contracts are Unenforceable as Unconscionable Adhesion Contracts*

In the spring of 2005, the West Virginia Supreme Court of Appeals handed down *State ex rel. Saylor v. Wilkes*.<sup>188</sup> In *Saylor*, a young woman entered into an employment agreement to be a server with Ryan's Family Steakhouse in Martinsburg, West Virginia.<sup>189</sup> As part of her pre-employment forms Saylor was given a form contract already filled out as between Ryan's employee and Employment Dispute Service, Inc. (EDSI) that bound her to arbitrate any of her employment-related claims that may arise in the course of her employment.<sup>190</sup>

After six months of employment, Saylor was allegedly sexually harassed by her supervisor, resulting in her constructive discharge.<sup>191</sup> Saylor filed a declaratory judgment action seeking to declare her arbitration contract with EDSI unenforceable because arbitrating her claim would fail to vindicate her individual civil rights and because the arbitration contract was an unconscionable contract of adhesion.<sup>192</sup> The trial court refused Saylor's request and entered an order forcing the dispute to arbitration, and Saylor filed an original writ of prohibition in the West Virginia Supreme Court of Appeals seeking to avoid arbitration.<sup>193</sup>

The West Virginia Supreme Court of Appeals sided with Saylor, holding that the arbitration contract lacked consideration.<sup>194</sup> The court held that because the contract was between a woman with a tenth-grade education and a

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<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> 613 S.E.2d 914 (W.Va. 2005).

<sup>189</sup> *Id.* at 917.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 919.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 924.

national restaurant chain, because the contract was between Saylor and EDSI, not Ryan's, and because Ryan's only consideration given to Saylor for signing the contract was that Ryan's would merely consider her employment application, the contract was unconscionable.<sup>195</sup>

The *Saylor* court avoided the Federal Arbitration Act and its subsequent jurisprudence because it voided the contract "on grounds that exist at common law," to wit, unconscionability. The court noted Saylor's argument that arbitration would fail to vindicate her individual rights, but the court never reached a decision on that particular point.<sup>196</sup> Therefore, *Copley's* holding that Human Rights Act violations are not subject to arbitration may not be affected by *Saylor*. If nothing else, *Saylor* reinforces West Virginia will look carefully and skeptically at arbitration agreements in employment contracts.

#### V. "THE SPACE BETWEEN": SUGGESTIONS TO THE WEST VIRGINIA SUPREME COURT TO MAINTAIN JUDICIAL RESOLUTIONS OF HUMAN RIGHTS ACT CLAIMS

At the heart of the struggle over arbitration is the familiar conflict between the freedom of contract and governmental paternalism. It is important to remember that an arbitration agreement is a waiver of important fundamental rights, and a waiver of such rights should be intensely scrutinized for fairness. It is less than convincing that a vague arbitration agreement, which is a precondition to employment, can constitute a fair waiver. However, courts have not been receptive to unconscionability arguments.<sup>197</sup>

Therefore, in order to strive towards fairness, West Virginia should maintain its holding that Human Rights Act violations are not subject to arbitration clauses. The West Virginia Supreme Court of Appeals has long recognized that the West Virginia state constitution affords more protections to its citizens than the federal constitution.<sup>198</sup> As a result, the West Virginia court should try to find state constitutional grounds to create a safe harbor for its ruling on Human Rights Act claims.

Failing that absolute protection, some concessions may be made to arbitration proponents, but the concessions should be carefully meted out. For example, one theory looks to the actual language of the arbitration agreement, distinguishing between a narrow agreement and a broad agreement. *Coffman v. Provost Umphrey Law Firm, L.L.P.* explains how the Fifth Circuit deals with arbitration agreements.<sup>199</sup> A narrow arbitration clause uses words like "disputes

<sup>195</sup> *Id.* at 922, 924.

<sup>196</sup> *Id.* at 919.

<sup>197</sup> See *supra* Part II.A. But see *Saylor*, 613 S.E.2d 914; *supra* Part IV.C.

<sup>198</sup> See, e.g., *Pushinsky v. West Virginia Bd. of Law Examiners*, 266 S.E.2d 444, 449 (W. Va. 1980).

<sup>199</sup> 161 F. Supp.2d. 720 (E.D. Tex. 2001). This case dealt with the status of arbitration agreements in employment contracts in the instance of employer violations of the Texas Human Rights Commission Act. *Id.*

arising out of this contractual agreement,” while broad clauses use language like “any dispute that arises out of or relates to the agreement or disputes that are in connection with the agreement.”<sup>200</sup>

In *Coffman*, the Fifth Circuit favored the West Virginia stance on arbitration, holding that a narrow arbitration clause is not sufficient to force a human rights statutory claim to arbitration. The reasoning is that the claim does not “arise out of” the contract; it arises out of the statute.<sup>201</sup> In order to waive legislatively created rights, the waiver must be specific and knowing.<sup>202</sup> A broad language arbitration clause that spells out specifically that discrimination claims will be arbitrated is probably needed.

## VI. CONCLUSION

Employment dispute arbitrations, in theory, are an alternate means to resolving disputes by wading through the cumbersome and lethargic judicial system. In a perfect world, this alternate forum would be a fair and even-handed venue for quick disposal of claims in a more cost-effective manner. However, factors, including the “repeat player syndrome” and lack of front-end bargaining equality, can aggregate and skew arbitration proceedings toward an employer-defendant.

Although freedom of contract notions usually uphold the enforcement of arbitration agreements, a special concern arises in the context of civil rights violations by the employer. The West Virginia legislature, noticing the importance of preventing arbitrary discrimination in the workplace, enacted the West Virginia Human Rights Act. Because of the special purposes laid out in the act supporting its enactment and because of the duties bestowed upon the West Virginia Human Rights Commission, forcing claims under this Act to arbitration will undermine its purpose. West Virginia, even in the face of United States Supreme Court case law that arguably demands otherwise, should maintain its position that Human Rights Act claims are properly resolved in the traditional judicial forum.

As a result, Hero, the lawyer, will be able to obtain a full adjudication of the rights of Heroine, his client. Burger Bliss, thanks to the public’s access to the traditional courts, will receive bad press as a result of its discriminatory acts. Furthermore, thanks to written opinions and public proceedings that are unavailable in arbitration, the development of civil rights law in West Virginia will march on. Thus, Heroine in accepting future employment, can rest assured that the law will adequately protect all of her civil rights, including the endless pursuit for that perfect pair of brown leather heels.

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<sup>200</sup> *Id.* at 725.

<sup>201</sup> *Id.* at 726.

<sup>202</sup> *Id.*

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